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SUBJECT: Draft Dutch Law Allows Takeover Protection, May Raise Barriers against U.S. Firms

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¶1. (U) SUMMARY With only two weeks to go before the deadline to implement the EU takeover directive, several large corporate takeover attempts have kindled political interest in defensive measures across Europe. Draft legislation to implement the directive in the Netherlands limits the use of defensive measures in a takeover battle, but contains a reciprocity condition that allows a company to use certain defensive techniques to protect itself when a U.S. party launches a public bid. Two provisions of the Dutch draft would limit the degree of protection, but those have met with strong opposition in Parliament. Experts doubt the efficacy of legal protection, and appear hopeful that the Dutch will end at least one defensive measure, the certification of shares. END SUMMARY

TAKEOVERS ACROSS EUROPEAN BORDERS

¶2. (U) The governments of Luxembourg, France and Belgium are working to fend off Mittal Steel's bid for Arcelor (ref A). The Spanish government is engaged in German energy company E.ON's bid to acquire Endesa. The French government has successfully engineered a merger between Suez and Gaz de France to frustrate a bid by Belgian energy company Electrabel. Politicians in the Netherlands still remember the legal battle ABN Amro needed to fight to acquire Italian bank Antonveneta last year, and are concerned to open their local market while other countries continue to protect theirs.

¶3. (U) The Takeover Directive seeks to facilitate cross-border mergers and acquisitions within the EU, and introduces restrictions on defensive measures in the case of a hostile takeover. The Directive, however, does not actually ban the board of directors taking defensive action in the case of a hostile takeover, nor does it end contractual or statutory defensive measures. Those choices are left up to the individual member states.

RECIPROCITY AGAINST U.S. TAKEOVER BIDS

¶4. (U) In the draft legislation to implement the Takeover Directive in the Netherlands, the GONL would not ban the use of defensive measures. A listed company could then choose whether it wants to be a protected company or an unprotected company. The law would also introduce a so-called reciprocity provision, meaning that an unprotected company could still try to defend itself in case of a hostile takeover by a protected company. Protected companies also include any U.S. companies. The explanatory note of the law argues that U.S. companies fall outside the scope of the Directive, so that a hostile takeover attempt warrants defensive measures by an unprotected company.

¶5. (U) The GONL has also included two provisions in the draft law that would limit the extent of protection companies can choose. The first would enable a large majority shareholder to break through defensive measures by replacing the executive and supervisory boards. The other would guarantee the right for the holders of certificates to exercise the voting rights of the underlying shares. (Certification is a defensive measure in which a management-friendly foundation is created which holds the company's shares, exercises their voting rights, and issues certificates against those assets to investors.) These provisions have met with strong opposition in Parliament, which wants a level playing field.

INSIDER VIEWS

¶6. (SBU) Finance Minister Zalm recently cited similar concerns, referring to the way other EU countries are choosing to implement the Directive. Reflecting on Zalm's remarks, a MOF spokesman expected the breakthrough provision

to be scrapped, but remains hopeful about the provision that would end certification. He went on to explain that Parliament has asked the GONL to find out how many Dutch companies still use certification. Initial findings indicate there are some twenty (including Unilever and ING) that use certification as a defensive measure.

¶7. (U) Tom Nederveen, legal takeover expert for U.S. owned Dutch merchant bank NIBC, notes that the legal power of a majority certificate holder remains unclear. He goes on to argue that Parliament's concerns presuppose that all Dutch companies are undervalued. He notes that ten years ago, a hostile takeover was doomed to fail, but shareholders now have a much greater say.

¶8. (U) Arnoud Boot, Professor of Corporate Finance and Financial Markets at the University of Amsterdam and Member of the Dutch Social Economic Council (SER), argues that legal measures against takeovers provide no real protection of economic activity in the Netherlands. The only way to address such concerns is through shareholders. The right shareholders are private shareholders who expect a decent return.

COMMENT

¶9. (U) Foreign investors already own eighty percent of the shares issued by the largest Dutch companies and few Dutch companies still employ certification as a defensive measure. Still, two foreign companies recently demonstrated the importance of certification. Oil company Yukos has shielded its international assets from the Russian state through a Dutch holding company (ref B) and Arcelor has moved its Canadian subsidiary Dofasco into a Dutch holding company in an attempt to fend off Mittal Steel. If the Netherlands

should end such structures, other countries in Europe may still provide shelter.

BLAKEMAN